

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SEP 08 2005

JAMES R. LARSEN, CLERK
DEPUTY
YAKIMA, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD LYNN SWIHART,

Defendant.

No. CR-04-2159-AAM

**ORDER DENYING
MOTION FOR DOWNWARD
DEPARTURE**

THIS MATTER came on for sentencing on September 6, 2005. James P. Hagarty, Esq., Assistant U.S. Attorney, appeared for the plaintiff. Gregory L. Scott, Esq., appeared for the defendant. Defendant was sentenced to a term of imprisonment of 99 months based, in part, on an advisory guideline range of 84-105 months arrived at by a total adjusted offense level of 23 and a Criminal History Category of V. The total adjusted offense level reflects a three level reduction for acceptance of responsibility pursuant to USSG §3E1.1 and a two level reduction for waiver of appeal rights.

Prior to sentencing, defendant filed a Motion For Downward Departure (Ct. Rec. 59). That motion is **DENIED** for reasons articulated in open court and memorialized herein.

“Minimal Participant”

Defendant asserts that pursuant to USSG §3B1.2, he should also be given a four (4) level reduction for being a “minimal participant” in the criminal activity. A “minor” participant gets a two (2) level reduction.

“[A]n adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to

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1 the defendant and the defendant otherwise qualifies for such an adjustment.” Application Note 2
2 to USSG §3B1.2. The “minimal participant” designation applies to a defendant “who plays a
3 minimal role in **concerted** activity” and “is intended to cover defendants who are plainly among
4 the least culpable of those involved in the **conduct of a group**.” Application Note 4. (Emphasis
5 added).

6 Defendant asserts that he was a “minimal participant” as compared to John Morehead,
7 who is also charged with Possession Of A Firearm By A Prohibited Person (CR-04-2158-AAM),
8 and who will be tried by a jury in this court on September 13. According to defendant:

9 Here, it is clear from the reports of law enforcement that
10 Mr. Morehead is the individual who burglarized houses
11 and stole the firearms involved in this offense. It is further
12 clear that he stole other firearms and that he had already
13 gotten rid of them before Mr. Swihart had any involvement
whatsoever in this crime. Mr. Swihart acted only as a
[courier] and middleman in this case. He returned the money
to Mr. Morehead and was only involved in these events for
a very short time.

14 Defendant is not charged with burglarizing houses and stealing firearms, nor is he
15 charged with engaging in some type of concerted or conspiratorial activity with Morehead. He is
16 charged with, and has pled guilty to, Possession Of A Firearm By A Prohibited Person. He was
17 not a “minimal participant” (or even a “minor participant”) in that crime. Plaintiff agrees the
18 government could prove beyond a reasonable doubt that “he had obtained 4 firearm[s] from John
19 Morehead, which he knew to be stolen, and admitted that he had sold one of the firearms”
20 (Plea Agreement, Ct. Rec. 49 at Paragraph 6). Morehead is also charged with Possession Of A
21 Firearm By A Prohibited Person, but that does not in any way diminish the fact that defendant
22 also possessed firearms which he was not supposed to have because of his previous felony
23 conviction in Snohomish County Superior Court on June 18, 1999 for Delivery of a Controlled
24 Substance.

25 Accordingly, there is no basis for a downward departure on the basis that defendant was
26 either a “minimal” or “minor” participant.

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1 **Firearms and Ammunition Used For Lawful Sporting Purposes**

2 USSG §2K2.1(b)(2) states:

3 If the defendant, other than a defendant subject to subsection(a)(1),
4 (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms
5 solely for lawful sporting purposes or collection, and did not un-
 lawfully discharge or otherwise unlawfully use such firearms or
 ammunition, decrease the offense level determined above to level 6.

6 As defendant concedes, under the guidelines alone, he is not entitled to the benefit of this
7 provision because he is subject to subsection (a)(2) (USSG §2K2.1(a)(2)) which, as recognized
8 by the Plea Agreement, starts him out with a base offense level of 24 because “the defendant
9 committed any part of the instant offense subsequent to sustaining at least two felony convictions
10 of either a crime of violence or a controlled substance offense.” Nevertheless, defendant asserts
11 he should get the benefit of §2K2.1(b)(2) through 18 U.S.C. §3553(a) which requires the court to
12 consider the nature and circumstances of the offense and the seriousness of the offense.
13 According to defendant, “the firearms involved were all sporting firearms” and “[b]y all
14 indications, they were sold to individuals who had no purpose or intent for those firearms other
15 than lawful sporting purposes.” Defendant requests a six (6) level reduction based on
16 §2K2.1(b)(2).

17 Whether or not the firearms were sporting firearms is of no consequence. This defendant
18 possessed these firearms subsequent to sustaining at least two felony convictions of either a
19 crime of violence or a controlled substance offense. If the defendant is not entitled to the benefit
20 of §2K2.1(b)(2) under a mandatory application of the guidelines, the court fails to see why he
21 should he be entitled to the benefit of it under an advisory application pursuant to 18 U.S.C.
22 §3553(a). §2K2.1(b)(2) does not apply to defendants like Mr. Swihart for an obvious reason.
23 Convicted felons represent a danger when they possess firearms, regardless of whether they are
24 “sporting firearms.” Moreover, §2K2.1(b)(2) refers to the **defendant** possessing the firearms
25 solely for lawful sporting purposes or collection. There is no evidence of that here. Defendant
26 knew the firearms had been stolen and he sold one of them. Furthermore, even if the intent of
27 the individual to whom defendant sold the one firearm was relevant, there is no actual evidence
28 that this individual intended to use the weapon for “lawful sporting purposes.”

1 There is no basis for a reduction of the offense level pursuant to §2K2.1(b)(2).

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3 **Criminal History**

4 In the Plea Agreement, Paragraph 9(d) states:

5 The United States and the Defendant believe that the Defendant's
6 Criminal History Category is V. The parties understand that the
7 Court will ultimately determine the Defendant's Criminal History
8 Category, after the Presentence Investigative Report is completed.
Should the parties have objections to the Presentence Investigation
Report criminal history calculations, the parties are not precluded
from making such objections under this agreement.

9 The pre-sentence report concludes that defendant's Criminal History Category is indeed
10 V. Defendant's counsel offered no objection to the criminal history calculation prior to his
11 "Motion For Downward Departure" filed on August 31, just a few days before sentencing. The
12 pre-sentence report was completed on June 27, 2005, in anticipation of sentencing on July 28,
13 2005. Upon the motion of defense counsel, sentencing was continued from July 28 to September
14 6. Defense counsel's motion to continue sentencing was filed on July 8 and in that motion (Ct.
15 Rec. 55), counsel said he would be out of the country and out of the state until July 26. As of
16 August 26, 2005, when the probation officer completed her Addendum to the Presentence
17 Report, she had not received any objections from defense counsel. Accordingly, the probation
18 officer had no opportunity to address the objections to the criminal history calculation now
19 contained in defendant's motion. The court fails to see any basis for the failure to present these
20 objections to the officer sooner than August 26 so that she could consider them in calculating
21 defendant's criminal history points. For that reason, the objections will not be considered by the
22 court.

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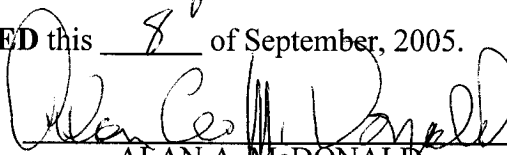
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1 **III. CONCLUSION**

2 Defendant's Motion For Downward Departure (Ct. Rec. 59) is **DENIED**.

3 **IT IS SO ORDERED.** The District Executive shall forward copies of this order to
4 counsel.

5 **DATED** this 8th of September, 2005.

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7 ALAN A. McDONALD
8 Senior United States District Judge
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